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IN THE

Supreme Court of the United States

.....TERM, 1940.

No. 953 59

LAMONT WILLIAM BOWMAN,

Petitioner,

vs.

MARTIN LOPERENA, GREGORIA LOPERENA, MARTIN J. LOPERENA, PHYLLIS FELICIANA BOUTON, GREGORIO LOPERENA and SEBASTIANA LOPERENA.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Ninth Circuit, and Brief in Support Thereof.

L. A. LUCE,
937 Munsey Building, Washington, D. C.,
Counsel for Petitioner.

J. EARL HASKINS,
As of Counsel.

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Ninth Circuit.

Your Petitioner Respectfully Shows:

I.

(1) Lamont William Bowman, on May 23, 1935, filed his petition in the District Court of the Southern District of California, Southern Division, for relief under Section 74 of the Bankruptcy Act as amended in 1934 (11 U. S. C. (1934), Sec. 202), praying for an extension of time within which to meet his obligations, and specifically waived composition. Said matter was thereafter referred to the Referee.

(2) August 19, 1936, the referee hearing said matter, *without making any order,* denying or granting debtor's extension proposal and acting as a Special Master without

any authority or order of Court for so doing, filed his recommendation with the District Court that the debtor, Bowman, be adjudicated a bankrupt. (App. Op. Br. p. 10.) [Tr. p. 141.]

(3) August 21, 1936, one of the District judges acting on the foregoing recommendation of the referee made his order of adjudication and reference under Section 74 of the said Bankruptcy Act and, on the same day, the Adjudication and order of Reference was filed with the clerk of said court. [Tr. p. 18.]

(4) August 27, 1936, Bowman, as debtor, filed a Petition for Review of Referee's Order.

(5) September 10, 1936, Bowman, debtor, filed a Petition for Rehearing with the clerk of the District Court at Los Angeles, California, praying that the Order of Adjudication be vacated and set aside.

(6) October 14, 1936, Bowman filed a Notice of Motion for Order to Set Aside and Vacate the Order of Adjudication.

(7) October 16, 1936, one of the District judges made and had entered his order specifically referring to the objection filed by the Loperenas to the "bankrupt's Petition for Rehearing," as follows:

> "It is Now Ordered that the entire matter of the Debtor's Petition for Extension that was re-referred to the Referee by the order of this Court entered May 15th, 1936, be again re-referred to the Referee with direction to said Referee to hear and consider said Debtor's Petition for Extension or any supplemental Petition by said Debtor for Extension of Debt, and to make an Order or orders thereon pursuant to provisions of the National Bankruptcy Act

and all amendments thereto and the General Orders in Bankruptcy, *and it is further ordered that all proceedings herein, other than those heretofore ordered, and particularly any further proceedings under the Adjudication and Order of Reference under Section 74 entered on August 21, 1936, be stayed until the further order of this Court made by a Judge thereof."* [Tr. pp. 37-38.] (The italics are ours.)

(8) October 25th, 1937, one of the District judges denied a review of a referee's order made June 14th, 1937, and confirmed the findings of the referee denying debtor's extension proposal. There was an addenda to the order, as follows:

"It Is Further Ordered that the stay of proceedings under the Order of Adjudication and Reference heretofore entered in this matter on August 21, 1936, be and the same is hereby vacated, set aside and quashed, and the Referee is directed to proceed under said Order of Reference and Adjudication to take and perform any and all such acts, and to do such things as are required, directed and authorized under said Order of Adjudication and Reference."

"Done in Open Court, this 25 day of October, 1937.

JEREMIAH NETERER

Judge of the U. S. District Court

(Filed R. S. Zimmerman, Clerk, at 47 min. past 11 o'clock Oct. 25, 1937, A.M. by M. R. Winchell, Deputy Clerk)." [Tr. pp. 87 and 88.]

(9) November 15, 1937, debtor Bowman prepared and filed his "Petition of Petitioning Debtor for Rehearing" [Tr. pp. 89-97], specifically requesting "that the adjudication of bankruptcy should be set aside and the matter be remanded to the Referee with orders to (1) reconsider the petitioning debtor's Proposal for Extension and (2) to withhold any proceedings in the bankruptcy matter until such time as it can be ascertained whether or not said trust deed was actually in default at the date that the declaration of default was made on or about the month of January, 1935." [Tr. p. 96.]

(10) November 15, 1937, the following order was affixed to the Petition of Petitioning Debtor for Rehearing prior to filing:

> "This Petition having been "seasonally presented" and "entertained" by the above entitled court, permission to file same is hereby granted.
>
> Dated: This 15th day of November, 1937.
>
> RALPH E. JENNEY
> *Judge of the District Court*
>
> (Endorsed: Filed R. S. Zimmerman, Clerk, at 27 min. past 4 o'clock, November 15, 1937, P.M. By M. R. Winchell, Deputy Clerk)."

(11) February 17, 1938, after a hearing had thereon, Honorable Jeremiah Neterer, District Judge, rendered his decision denying debtor's Petition for Rehearing. [Tr. P. 119.] (Endorsed: Filed Feb. 17, 1938, R. S. Zimmerman, Clerk, by R. B. Clifton, Deputy.)

(12) March 18th, 1938, Petition for Appeal to Circuit Court of Appeals, Ninth Circuit, was allowed and filed. [Tr. pp. 147-148.] [Tr. p. 150.] (Endorsed: Filed R. S. Zimmerman, Clerk, at 19 min. past 1 o'clock, Mar. 18, 1938, A.M., by M. J. Sommer, Deputy Clerk.)

(13) May 2, 1939, the Honorable Circuit Court rendered its decision as follows:

"Court and Cause—No. 8796

May 2, 1939

"Upon Appeal from the District Court of the United States for the Southern District of California, Southern Division.

"Before: Denman, Mathews and Healy, Circuit Judges.

Denman, Circuit Judge:

"Appellant, debtor in a proceeding under sec. 74 of the National Bankruptcy Act as amended in 1934 (11 USCA sec. 202), filed his petition for an appeal from certain orders in that proceeding on March 18, 1938, and the district judge granted the petition and allowed the appeal on the same day.

"The petition states the orders sought to be appealed from are: '* * * that certain order rendered October 15, 1937, (and entered October 25, 1937), and the subsequent order denying petition for rehearing from the above order, dated February 17, 1938, and your petitioner further considering himself aggrieved by the denial of his petition and/or supple-

mentary petitions for relief under Section 74 of the Bankruptcy Act, does hereby appeal to the United States Circuit Court of Appeals of the Ninth Circuit from such order or orders, judgment or judgments, and particularly from the order of adjudication, made and entered August 21, 1936, and the order denying petitioner's claim to a $1,000.00 credit on a note secured by a purchase money trust deed in favor of the "secured creditors" (Loperenas'), * * *.

"The order of February 17, 1938, denying the petition for rehearing of an order of October 15, 1937, is not appealable. Wayne Gas Co. v. Owens, 300 U. S. 131, 137.

"An examination of the record shows that all the other orders from which the appeal was granted were made many months before the petition for appeal was filed and the allowance made by the district judge, the nearest to the filing having been made nearly four months prior to the judge's allowance. Hence he had no jurisdiction to allow the appeal.

"Appeal dismissed.

(Endorsed: Opinion. Filed May 2, 1939. Paul P. O'Brien, Clerk.)"

(14) May 29, 1939, a petition for rehearing from the decision entered May 2, 1939, was filed by Bowman, and, on June 10, 1939, the Circuit Court granted the petition for rehearing; the Loperenas filed their brief on rehearing June 30, 1939, and Bowman filed his reply brief July 19, 1939.

(15) August 28, 1939, the Circuit Court rendered its decision on the Petition for Rehearing, as follows:

"Court and Cause: No. 8796

Aug. 28, 1939.

Upon Appeal from the District Court of the United States for the Southern District of California, Southern Division.

On Rehearing.

"Before: Denman, Mathews and Healy, Circuit Judges.

Denman, Circuit Judge:

"Appellant, debtor in a proceeding under Sec. 74 of the National Bankruptcy Act as amended in 1934 (11 USCA Sec 202), filed his petition for an appeal from certain orders in that proceeding on March 18, 1938, and the district judge granted the petition and allowed the appeal on the same day.

"The petition for appeal stated that it was from * * * that certain order rendered October 15, 1937 (and entered October 25, 1937), and the subsequent order denying petition for rehearing from the above order, dated February 17, 1938, and your petitioner further considering himself aggrieved by the denial of his petition and/or supplementary petitions for relief under Section 74 of the Bankruptcy Act, does hereby appeal to the United States Circuit Court of Appeals of the Ninth Circuit from such order or orders, judgment or judgments, and particularly from the order of adjudication, made and entered August 21, 1936, and the order denying petitioner's claim to a $1,000.00 credit on a note secured by a purchase money trust deed in favor of the "secured creditors" (Loperenas') * * *.

"The district court adjudicated the appellant a bankrupt by an order of date August 21, 1936. The statutory period for appeal was extended by a petition to vacate the order and for a rehearing filed on September 10, 1936. Morse v. U. S., 270 U. S. 151, 153, 154; Mitchell v. Maurer, (CCA-9), 67 F. (2d) 286, 287.

"After a subsequent hearing, an order was made on October 16, 1936, referring to but not deciding the petition of September 10, 1936, and ordering a stay of proceedings under the adjudication. The litigation continued with no decision on the petition for rehearing until October 25, 1937, when it was disposed of by an order of Judge Neterer directing the referee "to proceed under the said order of reference and adjudication."

"On November 15, 1937, there was filed a petition to rehear the order of October 25, 1937, denying the petition to rehear the order of adjudication. This petition to rehear the order denying the first petition to rehear was denied on February 17, 1938. *In our opinion the first petition to rehear extended the time to appeal to its denial on October 25, 1937.* The time to appeal then began to run and it had expired long before the filing of the petition for an appeal on March 18, 1938, and the order allowing it on the same day.

"There is no merit in the contention that a petition to reheal an order denying a petition to set aside a previous order of adjudication and rehear the petition for adjudication in bankruptcy again extends the time for appeal from the adjudication.

"The order denying a petition to set aside an order and rehear the petition for adjudication in bankruptcy

is not appealable. Wayne Gas Co. v. Owens, 300 U. S. 131, 137. The district court has lost its jurisdiction to allow the appeal from the order of adjudication before it made its order of March 18, 1938, purporting to allow such appeal.

"The order of October 25, 1937, also confirmed the referee's findings, among others, that bankrupt had not paid a certain $1,000 on the creditors' claim of the Loperena appellees and dis-allowed the debtor's claim of a credit to that amount. The petition of November 15, 1937, for setting aside this order of the court extended the time of appeal until its denial on February 17, 1938, and the appeal from this order was duly taken.

"On the merits of the disallowance of the $1,000.00 credit, the evidence of the debtor is not uncontradicted as claimed by him. On the contrary it is contradicted by the debtor himself, who stated in his schedules that he owed the sum claimed by the Loperenas. The referee could well have believed the debtor was not telling the truth on the stand and that he did tell the truth when he filed his schedules.

"The appeal from the order adjudicating the bankruptcy is dismissed and the order denying petitioner's claim to the $1,000 credit on the Loperena note is affirmed. (The italics are ours.)

"(Endorsed:) Opinion on rehearing. Filed Aug. 28, 1939. Paul P. O'Brien, Clerk."

(16) September 27, 1939, a Petition for Rehearing from Decision entered August 28, 1939, was filed.

(17) March 14, 1940, the Circuit Court rendered its decision as follows:

"Court and cause. No. 8796

Mar. 14, 1940

"Upon Appeal from the District Court of the United States for the Southern District of California, Southern Division, On Petition for Rehearing.

"Before: Denman, Mathews and Healy, Circuit Judges.

Denman, Circuit Judge:

"Appellant, debtor in a proceeding instituted by him May 23, 1935, under Section 74 of the Bankruptcy Act, as amended in 1934, filed in the district court on March 18, 1938, his petition for an appeal from certain orders in that proceeding and the district court granted the petition and allowed the appeal on the same day.

"The district court adjudicated the appellant a bankrupt by an order of date August 21, 1936, and appellant purports to appeal from this order under Section 25 (a) of the Bankruptcy Act as amended in 1934 as a judgment adjudging him a bankrupt. Appellant's time to appeal under Section 25 (a) expired thirty days after this judgment adjudging the debtor a bankrupt was rendered, unless the running of the time for taking appeal was suspended by a petition for rehearing. See Morse v. United States, 270 U. S. 151, 153, 154, citing cases. Appellant filed a petition for rehearing on September 10, 1936, but it appears to be directed to certain action of the referee rather than to the order of adjudication. However,

even if we assume there was a valid petition for rehearing which suspended the running of the time for taking an appeal, the time began to run when the district court, on October 25, 1937, denied the petition for rehearing and a motion to vacate which had been made in October, 1936, by ordering the Referee "to proceed under the said order of reference and adjudication."

"The order entered October 25, 1937, also confirmed an order of the Referee of June 14, 1937, denying the debtor's petition for extension and for confirmation of the proposals therefor. On November 15, 1937, there was filed by the appellant a petition for rehearing with respect to the order of the District court entered October 25, 1937, in so far as it confirmed the order of the Referee, but the petition does not appear to be and the appellant concedes that it was not also a petition for rehearing with respect to the order of adjudication of August 21, 1936.

"The time for appeal from the order of adjudication began to run upon the denial of the first mentioned petition for rehearing by the order entered October 25, 1937, and it had expired long before the filing of the petition for an appeal on March 18, 1938.

"The appellant also treats the order of the district court of October 25, 1937, confirming the order of the Referee of June 14, 1937, as being appealable under section 25(a) by the petition to the district court for allowance, as a judgment rejecting a claim in excess of $500.00. With this we do not agree. Appellant appears so to regard the order of the district

court because the Referee in connection with his order denying confirmation and his declaration that the plan for extension proposed by the debtor 'does not include an equitable and feasible method of liquidation for the secured creditors whose claims are affected and of financial rehabilitation for the debtor himself,' made a finding, *inter alia*, that appellant had not as he contended made a $1,000 payment to one of the appellee secured creditors for which he had not received credit, and the district court approved the findings of the Referee. However, the only order made by the Referee on June 14, 1937, was one denying the petition of the debtor for an extension and for confirmation of his proposals therefor, and the order of the district court confirming this order of the Referee was not a judgment rejecting a claim within the meaning of Section 25(a). Assuming that the order of the Referee and the order of the district court confirming the Referee's order were in anywise predicated upon the finding with respect to the $1,000 payment, the validity of these orders and of the finding are matters not properly before us. The order of the district court confirming the order of the Referee denying the petition for extension and for confirmation was not within any of the classes of judgments from which an appeal could be taken under section 25 (a) of the Bankruptcy Act as amended in 1934, and since it was not in a (controversy) arising in bankruptcy proceedings it was not appealable under Section 24 (a) of the Act.

"The appeal also purports to be taken from an order of February 17, 1938, denying a petition for re-

hearing, but such an order is not appealable. See Wayne Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131, 137, citing cases in footnote 10.

"The petition for rehearing filed September 28, 1939, is denied. The opinion of this court filed August 28, 1939, is withdrawn. The decree of this court filed and entered on August 28, 1939, is vacated and set aside. It is ordered that a decree be entered dismissing the appeal.

"Appeal dismissed.

"(Endorsed:) Opinion On Petition for Rehearing. Filed Mar. 14, 1940. Paul P. O'Brien, Clerk."

(18) March 19, 1940, an Order Staying Mandate of the Circuit Court of Appeals was made by Honorable William Denman, U. S. Circuit Judge, and filed the same date, staying said mandate to and including April 20, 1940, in the event a Petition for Writ of Certiorari is filed in said case in the Supreme Court of the United States within said time.

(19) April 16th, 1940, an extension of time to file the foregoing Writ of Certiorari with the United States Supreme Court was duly granted by the Honorable William Denman, U. S. Circuit Judge, effective to and including May 1, 1940.

(20) On the.....day of....., 1940, a petition for Writ of Certiorari was filed in accordance with the provisions of the order staying mandate and extension of time thereon.

Questions Involved.

The ultimate decision of the Circuit Court, rendered March 14, 1940, was an order that a decree be entered dismissing the appeal and the appeal was thereupon dismissed; it being held by the Court that the judgment or order entered Oct. 25, 1937, started the running of the time for the filing of the appeal and that a subsequent petition for rehearing "seasonally presented" and "entertained" by an order of one of the District judges did not have the effect of extending the time to "thirty days" after the decision had been rendered on the last named petition for rehearing, to-wit, February 17, 1938; but that the final date for filing the appeal was thirty days after October 25, 1937, and not thirty days after February 17, 1938; hence the allowance and filing of the appeal on March 18, 1938, was too late and the Court did not have jurisdiction to consider same.

Question No. 1: Was the appeal filed within the time allowed by Section 25 (a), Subdivision 1, of the Bankruptcy Act as amended in 1934, 11 U. S. C. (1934), Sec. 202, said section reading as follows: "appeals * * * may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeal of the United States * * * (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt * * * such appeal shall be taken within thirty days after the judgment appealed from has been rendered * * *," and did the petitions for rehearings hereinbefore referred to, and orders thereon, suspend the time within which to have allowed and filed an appeal from the order of adjudi-

cation and reference made August 21, 1936, to a time on or before "thirty days" after Oct. 25, 1937, or to a time on or before "thirty days" after Feb. 17, 1938?

Question No. 2: The appeal having been filed in time, we are then concerned with the following question "on the merits."

Is it possible to install validity or breathe life into the original void adjudication and order of reference by a subsequent order made Oct. 25, 1937 and affirmed on rehearing on February 17, 1938? Said order directed the Referee to proceed "under said order of reference and adjudication to take and perform any and all such acts and to do such things as are required, directed and authorized under said adjudication and order of reference." The adjudication and order of reference dated August 21, 1936, was beyond the power and jurisdiction of the District judge to make under the only provisions of the Bankruptcy Act under which such adjudication and order of reference could have been made, to wit, Title 11, U. S. C. A., Sec. 202, Subdivision "L" thereof (Sec. 74 of the Bankruptcy Act, as amended June 7, 1934), and the General Orders in Bankruptcy as amended April 17, 1933, paragraph XII thereof.

Jurisdiction.

Petitioner contends that the Petition for Rehearing was filed with the clerk of the District Court at Los Angeles, California (and not with the clerk of the Referee in Bankruptcy at San Diego), on September 10, 1936, from the Adjudication and Order of Reference entered Aug. 21, 1936, and it suspended the time for the allowance and filing of the appeal until a final order had been made and entered covering the above named Petition for Rehearing. The order made Oct. 16, 1936, by one of the judges of the District Court was an interlocutory order staying proceedings under the Adjudication and Order of Reference. The order made Oct. 25, 1937, was primarily based on the Petition for Review of the order of the Referee of June 14, 1937, concerning an entirely different subject matter, but there was affixed to the order of Oct. 25, 1937, a clause specifically vacating and setting aside that part of the order theretofore made on Oct. 16, 1936, wherein "proceedings * * * be stayed until further order of this court made by a judge thereof."

Bowman filed his petition to rehear the order made Oct. 25, 1937, within the statutory period, to wit, on November 15, 1937. Before filing this Petition for Rehearing, however, it was presented to one of the District judges who endorsed thereon that the petition was "seasonally presented" and "entertained" thereafter, on the same day, it was filed with the clerk of the District Court at Los Angeles, California.

February 17, 1938, the last named Petition for Rehearing was denied and an order entered thereon.

Thereafter, within the statutory period of "thirty days", to wit, on March 18, 1938, Bowman presented his petition for appeal to one of the District judges, who granted and allowed the same, and said "allowed" appeal was filed on the same day, *i. e.*, March 18, 1938.

IT IS THE FURTHER CONTENTION OF BOWMAN THAT:

FIRST: Timely motion for leave to file the second petition on November 15, 1937, was made and it is obvious from the endorsement on said petition by one of the District judges that the same was "seasonally presented" and "entertained"—thus the time for perfecting an appeal did not begin to run until the day that the Court actually denied such Petition for Rehearing, to wit. on Feb. 17, 1938.

SECOND: In any event, the judgment made pursuant to the original Petition for Rehearing of September 10, 1936, did not become a final judgment until the second Petition for Rehearing was denied, on February 17, 1938; hence, the final day for filing the appeal was not "thirty days" after October 25, 1937, but was "thirty days" after February 17, 1938, and since the appeal was allowed and filed March 18, 1938, said appeal was taken in time.

It is therefore evident that the Circuit Court did have jurisdiction to determine "the merits" of the case.

The final decision of the Circuit Court was rendered March 14, 1940. An order was obtained March 19, 1940, staying mandate and granting Bowman until April 20, 1940, in which to file a Writ of Certiorari in the United States Supreme Court; prior to April 20, 1940, an extension of time was granted by the Circuit Court to and including May 1, 1940; thereafter, on the ..... day of ....., 1940, the Petition for Writ of Certiorari was filed.

Grounds Upon Which It Is Contended the Questions Involved Are Substantial and Within the Jurisdiction of the Honorable United States Supreme Court to Review on Certiorari.

FIRST: The final decision rendered by the Circuit Court is in conflict with decisions of another Circuit Court of Appeals on the same matter and in conflict with decisions of the United States Supreme Court.

SECOND: The final decision rendered has departed from law as determined by the United States Supreme Court so as to call for an exercise of this Court's power of supervision.

Cases Believed to Sustain Jurisdiction Are as Follows:

Gypsy Oil Company v. Lee Bennett-Escoe, 275 U. S. 498, on 498 and 499;

Wayne Gas Company v. Owens-Illinois Glass Co., 300 U. S. 131, 137;

Morse v. U. S., 270 U. S. 151, 153, 154;

U. S. v. Seminole Nation, 299 U. S. 417;

National Labor Relations Board v. MacKay R. & Tel. Co., 304 U. S. 333;

In re McCall, 145 Fed. 898;

Mitchell v. Maurer (C. C. A. 9), 67 Fed. (2d) 286, 287;

Aspen Mining & Smelting Co. v. Billings, 150 U. S. 31, 36;

Mortgage Loan Co. v. Livingston (C. C. A. 8), 45 Fed. (2d) 28, 31;

Duryea Power Co., Bankrupt, v. Sternbergh, 218 U. S. 299;

Bonner v. Potterf, 47 Fed. (2d) 852;

Conboy v. First Nat'l Bank, 203 U. S. 141;

In re Strauss (C. C. A. 2), 211 Fed. 123;

Serkowich v. Wardell, 102 Fed. (2d) 253;

Bostwick v. Brinkerhoff, 106 U. S. 3;

Arnold v. U. S., 263 U. S. 427;

Kingman v. Western Mfg. Co., 170 U. S. 675;

Title 28, Section 225, Subd. a, U. S. C. (*Judicial Code,* Section 128, Amended).

Appellate Courts Will Not Try Out Controversies in "Piecemeal"—the Appealed From Judgment Must Be Final and Complete!

Collins v. Miller, 252 U. S. 364, 370, and cases therein cited;

Pearson v. Higgins, 34 Fed. (2d) 27.

Wherefore, your petitioner prays: That a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court had in the case numbered and entitled, "In the Matter of Lamont William Bowman, Debtor, Lamont William Bowman, Appellant, vs. Martin Loperena, *et al.,* Respondents, No. 8796," to the end that the cause may be reviewed and determined by this

Court as provided for by the statutes of the United States; and that the judgment herein of said Court be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Dated: at Los Angeles, California, the 27th day of April, 1940.

L. A. LUCE,
Counsel for Petitioner.

J. EARL HASKINS,
Of Counsel.

IN THE

Supreme Court of the United States

....., TERM, 1940.

No. .....

LAMONT WILLIAM BOWMAN,

Petitioner,

vs.

MARTIN LOPERENA, GREGORIA LOPERENA, MARTIN J. LOPERENA, PHYLLIS FELICIANA BOUTON, GREGORIO LOPERENA and SEBASTIANA LOPERENA.

BRIEF OF PETITIONER.

Opinions rendered below:

FIRST: The opinion on appeal in the Circuit Court of Appeals for the Ninth Circuit, rendered May 2, 1939.

SECOND: The opinion on rehearing in the Circuit Court above named, rendered August 28, 1939.

THIRD: The opinion on rehearing in the Circuit Court above named from the opinion on rehearing of August 28, 1939, rendered March 14th, 1940.

Jurisdiction.

(Statement of jurisdiction has been covered in the Petition for Writ of Certiorari.)

In support of the contention that this Honorable Court should review this matter on certiorari, petitioner respectfully submits:

ONE.

That the Per Curiam Decision Rendered in the Case of Gypsy Oil Company v. Leo Bennett Escoe, 275 U. S. 498, Is Determinative of the Question Which the Circuit Court Has Heretofore Decided Adversely Against Lamont William Bowman.

This decision, read and interpreted in connection with the decision of the *Wayne Gas Company v. Owens-Illinois Glass Co.*, 300 U. S. 131, supports the contention of Bowman, that the appeal was allowed and filed within the time allowed by statute under Section 25 (a) of the National Bankruptcy Act, as amended—taking into consideration the time suspended by the petitions for rehearing and decisions thereon.

That part of the *Gypsy Oil Company* case, *supra,* pertinent to the facts of the case at bar, is quoted in full:

> "The running of the time within which proceedings may be initiated here to bring up judgment or decree for review is suspended by the seasonable filing of a petition for rehearing. But it begins to run from the date of denial of such petition and further suspension cannot be obtained by the mere presentation of a motion for leave to file a second request for rehearing. *Morse v. United States,* 270 U. S. 151, 153, 154.
>
> *"If, however, a timely motion for leave to file the second petition is granted, and the petition is actually entertained by the Court, the time within which application may be made here for certiorari begins to run from the day when the Court denies such second petition."* (The italics are ours.)

In the case at bar the facts are unquestionably applicable to the last portion of the above decision. Bowman actually made application to the District Judge for leave to file his Petition for Rehearing. Said "petition" was "seasonally presented" and "entertained" by the above District Court," and "permission to file same is hereby granted," is the identical wording endorsed on the petition on November 15th, 1937, by the Honorable Ralph E. Jenney, Judge of the District Court. [Tr. p. 97.]

The second petition for rehearing was denied February 17, 1938. Hence it seems that the only interpretation which can be placed on the *Gypsy Oil Company, Morse v. U. S.*, and *Wayne Gas Company* cases is in conformity with the contention of your petitioner, which is that the time for allowance and filing of the appeal did not start to run until the denial of the second petition, to-wit, February 17, 1938.

The Petition for Rehearing From the Circuit Court's Decision Which Was Entered May 2, 1939, Was the Result of Many Hours' Careful Research and Painstaking Preparation, as Will Be Obvious to This Honorable Court Upon Perusal. Your Petitioner Is Confident That the Brief Supporting the Said Petition Was and Is Persuasive of His Contention That the Said Rehearing, Having Been "Seasonally Presented" and "Entertained" by Judge Jenney, and Having Been Heard and Determined by Judge Neterer, Did Toll the Statute Which Limits the Time Within Which an Appeal May Be Taken,—i. e., the Appeal Herein Was Taken in Time. Your Petitioner Therefore Feels That He Can Offer No Better Guide to This Honorable Court Than to Quote, Somewhat Extensively, From the Said Petition, as Follows:

"Appellant respectfully submits that the appeal in this case was not from the Order Denying Petition for Rehearing dated February 17, 1938, but was

from the Order dated October 15th, 1937 (entered October 25th, 1937). [Tr. of R. pp. 87-88.]

"Within the 30 day period allowed for the taking of an appeal, to-wit, on the 15th day of November, 1937, a Petition for Rehearing from the Order entered October 25th, 1937, was filed with the clerk of the District Court. [Tr. of R. p. 89.]

"In accordance with the law pertaining thereto, and prior to the filing of said Petition for Rehearing, said Petition was presented to the Honorable Ralph E. Jenney, District Judge, who placed the following wording thereon before filing:

"This petition having been "seasonably presented" and "entertained" by the above entitled court, permission to file same is hereby granted.

Dated: This 15th day of November, 1937.

RALPH E. JENNEY,
Judge of the District Court.'

[Tr. of R. p. 97.]

"Said Petition for Rehearing was heard by the District Judge, sitting in San Diego, Cal., and a written decision denying said Petition for Rehearing was made and entered February 17th, 1938.

The petition for appeal was filed March 18, 1938. [Tr. of R. pp. 122-128.]

"The record is replete with facts to establish without any question that appellant did not permit any period of time to elapse within which any right of appeal would be lost.

"The right of appeal from an order in bankruptcy proceeding is tolled if a petition for rehearing is filed and entertained within the statutory time for appeal:

" 'The same rule should govern motions for rehearings and motions for new trials. It thus appears that the date of entry of the judgment, although it may actually be entered at a prior date, is not, for the purposes of appeal, considered as having been entered at the earlier date, but is considered as having been entered on the date when the motion for new trial is disposed of by the lower court.'

Sims v. Douglass (C. C. A. 9), 82 Fed. (2d) 812, 815.

" 'The rule is that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal. Brockett v. Brockett, 2 How. 238, 249; Texas & Pacific Railway v. Murphy, 111 U. S. 488; Memphis v. Brown, 94 U. S. 715; * * *'

Aspen Mining & Smelting Co. v. Billings, 150 U. S. 31, 36.

"It is universally held, in view of this statute, that the Circuit Court of Appeals has no jurisdiction of a case where more than three months has intervened between the day of judgment or decree and the day * * * the appeal was taken, *unless it appears that a motion for rehearing or reconsideration was filed within the term at which the judgment or decree was entered * * * in which case the time between the filing of the motion and its denial will be excluded.* (The italics are ours.)

Luce & Co. v. Cintron (C. C. A. 1), 73 Fed. (2d) 481.

"'It is well settled, of course, that a petition for rehearing duly and seasonably filed suspends the running of the time for taking an appeal. *Morse v. U. S.*, 270 U. S. 151; but, to be seasonably filed for this purpose, it must be filed before the time has expired within which the right to appeal is given by Act of Congress.'

McIntosh v. U. S. (C. C. A. 4), 70 Fed. (2d) 507.

To the same effect:

Chicago, M. & St. P. Ry. Co. v. Leverentz (C. C. A. 8), 19 Fed. (2d) 915;

Northwestern Public Service v. Pfeifer (C. C. A. 8), 36 Fed. (2d) 5;

Stradford v. Wagner (C. C. A. 10), 64 Fed. (2d) 749.

"A motion for a rehearing in equity or for a new trial at law tolls the statute limiting the time within which appeals may be taken:

Mitchell v. Maurer (C. C. A. 9), 67 Fed. (2d) 286, 287;

Morse v. U. S. (supra);

Citizens Bank of Michigan City v. Opperman, 249 U. S. 448;

Brockett v. Brockett, 2 How. (43 U. S.) 238, 240;

Janus v. U. S. (C. C. A. 9), 38 Fed. (2d) 431, 433.

"An order was made in the following case *January 19, 1929.* In the opinion the court said:

" 'It appears that *within thirty days* from the date of its entry, a petition for rehearing was filed, was entertained by the court, and denied on *March 22, 1930.*

" 'The order, because of the pendency of this petition for rehearing, did not become final until the denial of the petition for rehearing March 22, 1930.'

Mortgage Loan Co. v. Livingston (C. C. A. 8), 45 Fed. (2d) 28, 31, and many cases cited therein.

"Appellant was mindful of the fact, when preparing and filing of the Petition for Rehearing and the filing of the appeal, that the right of appeal once lost could not be revived by petition or motion for rehearing, and for his authority on the subject referred to the 1937 Cumulative Supplement to Manual of Federal Appellate Procedure, 2nd Edition, by Paul P. O'Brien, particularly chapter XV thereof, pages 84-86, and cases quoted:

Conboy v. First National Bank, 203 U. S. 141, 145;

U. S. v. Dowell (C. C. A. 8), 82 Fed. (2d) 3;

Zimmern v. U. S. (C. C. A. 5), 80 Fed. (2d) 993;

Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131.

"Statutes regulating appeals are remedial and should have a liberal construction in furtherance of the right of appeal.

2 *R. C. L., "Appeal and Error,"* Par. 6;

In re Hurley Mercantile Co. (C. C. A. 5), 56 Fed. (2d) 1023.

"Did the Order of Adjudication and Reference Become Final Before the Appeal Was Taken?

"August 19, 1936, the Referee filed with the clerk of the District Court, a certificate recommending that the debtor * * * be adjudicated a bankrupt.

"Without notice to said debtor that his Petition for Extension had been denied, and prior to the time that a review could be taken of the said order of the Referee, and on the assumption that the recommendation of the Referee was correct, an Order of Adjudication and Order of Reference (under section 74) was made and entered, August 21, 1936.

"Immediately upon learning of said last named order, to-wit, on August 27, 1936, debtor Bowman filed his Petition for Review of Referee's Order. [Tr. of R. p. 27.]

"September 10, 1936, and within 20 days after the Order of Adjudication, debtor Bowman filed a Petition for Rehearing praying that the decree and order of the Court be vacated and that said cause be reheard and reconsidered. [Tr. of R. p. 29.]

Petition for Review and Petition for Rehearing were set for hearing October 16th, 1936.

"Prior to the time of said hearing, another Notice of Motion for Order to Set Aside and Vacate Order Adjudicating Debtor a Bankrupt was served and filed, and set for hearing October 16th, 1936. [Tr. of R. pp. 32-36.]

"October 16, 1936, said matters came on for hearing before Honorable Paul J. McCormick, District Judge sitting in San Diego, California, at which time the said District Judge ruled that the Referee had erred in making his recommendation and re-referred the entire matter to the Referee for further proceed-

ings, and specifically making the following order and none other:

"'This matter coming before the Court for:

1. Hearing on Motion of Martin Loperena, *et al.*, for the Court to hear and determine the objection to bankrupt's petition for re-hearing, etc. pursuant to notice filed September 30, 1936;

'2. Hearing on Motion of bankrupt to vacate and set aside order adjudicating debtor a bankrupt and to dismiss proceedings without prejudice pursuant to notice filed October 14, 1936. * * *

'whereupon the matter of the Review of the purported order of the Referee dated August 19th, 1936, now coming regularly before the Judge of the Court, and it appearing that the Referee herein has failed to make any order in compliance with said order of re-reference, and has also failed to send up or transmit a Summary of the Evidence as required by the General Orders in Bankruptcy,

'It is now ordered that the entire matter of the Debtor's Petition for Extension that was re-referred to the Referee by the order of this Court entered May 15th, 1936, be again re-referred to the Referee with direction to said Referee to hear and consider said Debtor's Petition for Extension or any supplemental Petition by said Debtor for Extension of Debt, and to make an order or orders thereon pursuant to provisions of the National Bankruptcy Act and all amendments thereto and the General Orders in Bankruptcy, *and it is further ordered that all proceedings herein, other than those hereinabove ordered, and particularly any further proceedings under the Adjudication and Order of Reference under Section 74 entered on*

August 21st, 1936, be stayed until the further order of this Court made by a Judge thereof.' [Tr. of R. pp. 37-38.] (The italics are ours.)

"An examination of the above order determines that the Petition for Rehearing under date of September 10, 1936, filed within 20 days after the Order of Adjudication, and the Motion to Set Aside and Vacate the Adjudication were not ruled upon and no order made thereon October 16, 1936.

"The District Judge specifically held in his order of October 16, 1936, that the Referee had committed error in the proceedings leading up to the Order of Adjudication of August 21, 1936.

"Until such time as the Petition for Rehearing filed September 10, 1936 from the Order of Adjudication filed August 21, 1936, was ruled upon and an order made thereon, the Order of Adjudication of August 21, 1936, is not final.

"Likewise, also until such time as the Motion to Set Aside and Vacate the Order of Adjudication of August 21, 1936, was ruled upon and an order made thereon, the said Order of Adjudication of August 21, 1936, was not final.

"At the time of the allowance of the appeal by the District Judge on March 18th, 1938, neither the Petition for Rehearing filed September, 1936 had been ruled upon nor an order made thereon; and neither had the Motion to Set Aside and Vacate the Order of Adjudication been ruled upon nor an order made thereon.

"The only conclusion that is possible to draw is that the Order of Adjudication of August 21, 1936, was not final, and that the appeal taken from said Order of Adjudication was not too late and that the Circuit Court has jurisdiction to hear and determine the case on the merits.

A Judgment Is Not Final as Long as a Motion to Set It Aside Is Pending.

Zimmern v. U. S. (C. C. A. 5), 80 Fed. (2d) 993, 994;

United States Ship. etc., Corp. v. Galveston Dry Dock & C. Co. (C. C. A. 5), 13 Fed. (2d) 607;

Mortgage Loan Co. v. Livingston (C. C. A. 8), 45 Fed. (2d) 28, 31;

Union Guardian Trust Co. v. Jastromb (C. C. A. 6), 47 Fed. (2d) 689;

Mitchell v. Maurer (C. C. A. 9), 67 Fed. (2d) 286;

Payne v. Garth, 285 Fed. 301;

Kingman v. Western Manufacturing Company, 170 U. S. 675;

Bostwick v. Brinkerhoff, 106 U. S. 3.

"* * * the Order must be final, but the finality that is required is the action, which disposes of the matter by way of judicial determination. France & Canada S. S. Co. v. French Republic (C. C. A.),

285 Fed. 290; Sullivan v. Associated, 6 Fed. (2d) 1000, 42 A. L. R. 503. Nothing remained to be done at the time this appeal was taken other than for the clerk to comply with the order of the judge. That was a purely ministerial act which followed as a matter of course. The order was final when the appeal was taken.

In re Reichert, 73 Fed. (2d) 56, affirmed 294 U. S. 116.

"A motion for a rehearing tolls the statute limiting the time in which appeals may be taken.

Mitchell v. Maurer, supra;

Morse v. U. S., 270 U. S. 151;

Citizens Bank v. Opperman, 249 U. S. 448;

Brockett, v. Brockett, supra;

James v. U. S., supra.

"Appellant wishes to specifically call the attention of the Court to the case of *Mortgage Loan Co. v. Livingston* (C. C. A. 8), 45 Fed. (2d) 28, 31, and cases cited therein: This case holds that an order did not become final during such time as petition for rehearing was pending, and can be stated as being directly in point in the case at bar.

"Appellant respectfully submits that the order made May 2nd, 1939, dismissing the appeal for lack of jurisdiction should be vacated, and that said appeal be considered on the merits."

TWO.

What Is a Final Judgment? What Construction Can Be Placed Upon the Minute Order of October 16, 1936 [Tr. 37-38] and What Construction Can Be Placed on the Order of October 25, 1937 [Tr. 87-88]? Will Appeals Be Accepted "Piecemeal"?

There seems to be no question but that the Minute Order of October 16, 1936, was interlocutory in its nature, and that it was the intention of the Court to "suspend" all proceedings under the Adjudication and Order of Reference.

It therefore follows that the judgment of adjudication could not have been final as long as a proceeding or motion to set it aside was pending.

The question which seems to have been forced upon us, however, is whether or not Bowman should have filed one appeal from the Order entered October 25, 1937, and another appeal from the Order entered February 17, 1938 there being no dispute from an inspection of the petitions for rehearing but that one of the main issues sought to be reviewed and upon which the appeal was based, was whether or not the Adjudication and Order of Reference dated August 21, 1936, was void from its inception.

The following questions must be taken into consideration to determine when the judgment of adjudication became final:

(1) Was said order interlocutory?

(2) Will appeals be accepted "piecemeal"?

(3) What jurisdiction does the Circuit Court of Appeals have in this appeal, if it should be determined that the order of October 16th, 1936, was interlocutory and not final?

(4) Is it possible for a party to appeal from an order, judgment or decree wholly in his favor?

The minute order made and entered October 16, 1936, by Judge McCormick was not a final order. The Loperenas' contention that Bowman should have appealed from the order of adjudication dated August 21st, 1936, caused by the erroneous and void recommendation of the Referee in Bankruptcy dated August 19, 1936, within thirty (30) days after the adjudication, or within thirty (30) days after interlocutory order of October 16, 1936, is really preposterous. It certainly cannot be said that Bowman "slept on his rights" and did not do everything possible to cause the Adjudication and Order of Reference to be reviewed and brought before the District Judge in the time allowed by law. An inspection of the order of Judge McCormick, dated October 16, 1936, can lead only to one conclusion, and that is that said order *was entirely interlocutory.* The entire proceedings were "re-referred to the Referee * * * and particularly any further proceedings under the adjudication and order of reference under Section 74, entered on August 21st, 1936, be stayed until further order of this Court made by a Judge thereof."

Subdivision 1: Was said order interlocutory?

An interlocutory order or decree is defined by the following cases:

In the case of *Buffum v. Maryland Casualty Company,* 77 Fed. (2d) 761, decided by the Ninth Circuit in 1935, we find this language:

> "Without determining the question of the amount for which the claim of Peter Barceloux Company should be allowed, it is ordered that the order of the referee rejecting said claim and amendment thereto be and the same is hereby overruled and the matter returned to the referee for further proceedings.

"[3] It is obvious that the order appealed from is not a judgment allowing the claim, and does not purport to be. It reverses an order rejecting the claim and refers the matter to the referee for the purpose of determining the amount to be allowed upon the claim. The amount of this claim when allowed will again be subject to review by the trial court. *It is not a final order. Duryea Power Co. Bankrupt, v. Sternbergh,* 218 U. S. 299, 31 S. Ct. 25, 54 L. Ed. 1047. It is clear then that the allowance of this appeal by the District Court from this interlocutory order did not confer jurisdiction upon this court." (The italics are ours.)

Relative to 11 U. S. C. A., Sec. 48 (original Bankruptcy Act, Section 25(a)),fixing time within which an appeal can be taken. (The appeal in the instant case was from sub. (3), but the reasoning is the same whether taken from a judgment adjudicating defendant a bankrupt or a judgment allowing or rejecting a debt or claim of $500.00 or over.) The Court said in the case of *Bonner v. Potterf,* (C. C. A. 10), 47 Fed. (2d) 852:

"The question then presented is whether or not the order of the trial court made on January 17, 1929, was a final adjudication, so that the appellant here should have effected his appeal from such order within thirty days of such date, * * *

"It will be observed that the petition filed by the appellant in March, 1929, seeking additional relief by having the matter referred to the referee came more than 30 days after the date of the original order finally adjudicating the claim under the petition for review. This petition is in the record designated as a petition to reopen or, if it be considered as a petition for a rehearing, the effect of such petition and its

status as a legal document, is substantially the same. If it be considered in the nature of a petition for a rehearing, it would seem that, because of having been filed after the expiration of the thirty days allowed for appeal, it came too late. *Conboy v. First National Bank,* 203 U. S. 141.

"However, several courts have held that a court may, even after the expiration of the time within which to appeal, in the exercise of its sound discretion, grant a rehearing. In *West v. W. C. McLaughlin & Co.'s Trustee,,* 162 Fed. 124, p. 125 (C. C. A. 6), the court in its opinion, after a discussion of the statute here under consideration, uses the following language:

"One purpose which runs through the act is to require the prompt and expeditious winding up of estates, and the provision just copied was intended to promote that end. Notwithstanding some judicial expressions which possibly favor it, we cannot accept as accurate or sustainable, the contention that it would not be an abuse of the discretion of the court to set aside an order disallowing a claim for the sole purpose of extending the time for taking an appeal. We conceive that such a course would practically nullify the wise provision of the statute, and go beyond the bounds of a proper discretion; but we do not doubt that an order disallowing a claim, as well as other orders, is within the control of the court making it, and that the court may, in the exercise of a sound judicial discretion, set it aside, even after the expiration of 10 days. This court, in the case of *Ives,* 113 Fed. 911, 51 C. C. A. 541, so decided upon a kindred proposition and fully stated the reasons for the rule. *The record shows that it was not a mere purpose to evade Section 25-a that*

induced the court below to set aside its order in this instance, but that it was done in order to have further investigation, and the learned judge of the District Court not only re-examined the questions involved, but more elaborately states his views thereon. The fact that he again arrived at the same conclusion did not neutralize his power to grant the rehearing, though some concession to the supposed hardship of the case may have had weight with him. Having reached the conclusion that there was no abuse of the court's discretion in granting the rehearing, the motion to dismiss the appeal will be denied." (The italics are ours.)

In the case of *In re Strauss* (C. C. A. 2), 211 Fed. 123, the Court said:

"Where an appeal from a referee's order denying the application of a bankrupt's trustee to introduce certain testimony and allowing the claim, *the district judge remanded the proceeding to the referee* with instructions to allow the trustee full latitude of inquiry with regard to the claim, but did not pass on the merits of the application to confirm the referee's report, *the order was interlocutory* and not appealable." (The italics are ours.)

In the case of *Serkowich v. Wardell,* 102 Fed. (2d) 253, it was said:

"A judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or

decree it had already rendered * * * if the judgment is not one which disposes of the whole case on its merits, it is not final. *Bostwick v. Brinkerhoff*, 106 U. S. 3; *Chappel v. O'Brien*, 22 App. D. C. 190, 193. An order setting aside a nonsuit, or vacating a judgment of dismissal and reinstating a case, since it does not dispose of the whole proceeding, is not final, but interlocutory."

The Supreme Court said in *Arnold v. U. S.*, 263 U. S. 427:

"It is a well-recognized principle that an appeal cannot be taken from an interlocutory order, or from a judgment or decree not final as to all the parties, the whole subject-matter and all the causes of action involved * * * and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction."

To the same effect see:

Southland Industries v. Federal Communications Commission, 99 Fed. (2d) 117.

In the case of *Triangle Electric Co. v. Foutch* (C. C. A. 8), 40 Fed. (2d) 353, it is said:

"Appeal under Sec. 24 (b) allowed by District Court; and should have been allowed by Circuit Court of Appeals—involved purely intermediate and preliminary order. *Held:* That appeals should be allowed from purely intermediate orders only in exceptional cases."

In the case of *In re Pechin*, 227 Fed. 853, 854, the Court said:

> "There must be a certain degree of finality about these administrative orders before they can be reviewed."

In the case of *Kingman v. Western Manufacturing Company*, 170 U. S. 675, there was a motion filed to set aside the judgment and the verdict and for a new trial. It was held in that case that the judgment did not become final and that the Circuit Court of Appeals are only empowered to review final decisions of the District Courts. Until such time as the motion or petition is disposed of and a decision made thereon the judgment is not final.

Referring to the aforesaid motion the Honorable Supreme Court of the United States declared as follows:

> "No leave to file it was required, and as it was entertained by the court, signed by counsel without objection and passed upon, it must be presumed that it was regularly and properly made.
>
> "This being so, the case falls within the rule if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal. Citing: *Aspen Mining Co. v. Billings*, 150 U. S. 31; *Brockett v. Brockett*, 2 How. 238, 249; *Texas R. R. Co. v. Murphy*, 111 U. S. 488; *Memphis v. Brown*, 94 U. S. 715; *Northern Pac. v. Holmes*, 155 U. S. 137."

To same effect:

Southland Industries v. Federal Communications Commission, 99 Fed. (2d) 117, *supra.*

The Court in *Mortgage Loan Co. v. Livingston,* 45 Fed. (2d) 28, makes this statement:

"No objection was made to the form of the petition for rehearing, nor was any motion made to strike it, but it was heard by the court on its merits. *Held:* Objections waived and not now available. Order January 19, 1929. Appeal March 22, 1930.

"The order, because of the pendency of this petition for rehearing, did not become final until the denial of the petition for rehearing March 22, 1930."

In the case of *Aspen Mining and Smelting Co. v. Billings, supra,* relative to the issue of whether or not a motion or petition for rehearing was entertained the Court stated as follows, on page 37 of the decision:

"But it is said this cannot be the result, under either statute or rule of the mere filing of a motion or petition for rehearing, and that it does not affirmatively appear in this case that the motion or petition was entertained by the court. But we should be inclined to hold, if a decision in that regard were called for, that, since the application was passed upon as having been duly made, the presumption must be indulged that it was entertained by the court in the first instance and during the term at which the decree was pronounced."

The petition for rehearing filed September 10, 1936, came on regularly to be heard and there were no objections made to the form of said petition, nor was any motion made to strike it. It was heard by the Court on its merits.

It was also held in the foregoing case that the petition for rehearing was duly and regularly entertained by the Court, although there was no actual allowance made by the Court prior to the time of its filing. The same reasoning is to be found in the case of *Mortgage Loan Company v. Livingston,* 45 Fed. (2d) 28.

Subdivision 2: Will appeals be accepted "piecemeal"?

It is fundamental that appeals will not be considered "piecemeal" by appellate courts.

In the case of *Pearson v. Higgins* (C. C. A. 9—Calif., 1929), 34 Fed. (2d) 27, at page 28, the Court declared the law to be as follows:

> "That issue—the only substantial one in the case—neither the referee nor the court below has determined. The referee decided only that in a summary proceeding, instituted by the trustee, the bankruptcy court had jurisdiction to entertain the issue. Being discontent with this ruling, made upon a preliminary objection, appellants, without awaiting the event of a trial on the merits, petitioned the district judge for a review, and the order from which this appeal is prosecuted went no further than to deny the petition. Manifestly, therefore, the appeal is premature. In an ordinary case at law, or in equity, an order over-

ruling an objection to the court's jurisdiction is not appealable; and no more is a like order in a bankruptcy proceeding. Appellants have no real grievance unless and until the referee entertained a turn-over order. After a hearing upon the merits, the trustee's prayer may be denied, in which contingency appellants have no ground to complain. *Appellate courts do not sit to anticipate possible grievance or to try out controversies in piecemeal.* The appeal will, therefore, be dismissed without prejudice to any question of jurisdiction or upon the merits; costs to appellee." (The italics are ours.)

The Supreme Court case of *Collins v. Miller,* 252 U. S. 364, 370, which was decided in 1920, is the authority for the following rule of law:

"A case may not be brought here by appeal or writ of error in fragments. To be appealable the judgment must be not only final, but complete. *United States v. Girault,* 11 How. 22, 32; *Holcomb v. McKusick,* 20 How. 552, 554; *Boswick v. Brinkerhoff,* 106 U. S. 3, 4; *Grant v. Phoenix Ins. Co.,* 106 U. S. 429, 431; *Dainese v. Kendall,* 119 U. S. 53; *Covington v. Covington First National Bank,* 185 U. S. 270, 277; *Heike v. United States,* 217 U. S. 423, 429; *Rexford v. Brunswick-Balke-Callender Co.,* 228 U. S. 339, 346, and the rule required that the judgment to be appealable should be filed not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved. *Louisiana Navigation Co. v. Oyster Commission,* 226 U. S. 99, 101; *Sheppy v. Stevens,* 200 Fed. Rep. 946."

Subdivision 3: What jurisdiction does the Circuit Court of Appeals have in this appeal, if it should be determined that the order of October 16th, 1936, was interlocutory and not final?

The jurisdiction of the Circuit Court to hear an appeal from a final judgment or decree (in bankruptcy) is contained in Title 28, Sec. 225, Subdivision (a), U. S. Code (Judicial Court, Sec. 128, amended).

Subdivision (b), same section, covers reviews of interlocutory orders or decrees of District Courts.

Subdivision (c), same section, covers appellate and subvisory jurisdiction in bankruptcy proceedings under Sections 47 and 48 of Title 11, U. S. Code.

Any appeal, other than is provided for in Subdivisions 1, 2 and 3 of Title 11, Section 48, is allowed only in the discretion of the Appellate Court.

We refer, for the sake of brevity, to the 1937 Cumulative Supplement to Manual of Federal Appellate Procedure (second edition) by Paul P. O'Brien; chapter X, which deals with Finality of Decree for Appeal Purposes, designates as not an appealable order:

> "An order denying a motion to vacate a judgment or decree." (*Smith v. U. S.* (C. C. A. 7), 52 Fed. (2d) 848.)

Had Judge McCormick made an order denying appellant's motion to vacate the order of adjudication, such order would not have been appealable, as the only order from which an appeal could have been taken is designated in Title 11, Section 48, Subdivision 1, U. S. Code, to-wit:

> "From a judgment adjudicating or refusing to adjudge the defendant bankrupt."

so the only appeal available to Bowman was or would have been from the Adjudication and Order of Reference—not from the interlocutory order of Judge McCormick.

It is apparent, then, under the facts as they existed in this case, that no appeal could have been taken until the rights of Bowman were actually jeopardized, as they were by the order of October 15, 1937, which order vacated the stay of proceedings under the Adjudication and Order of Reference theretofore made by Judge McCormick on October 16, 1936, as aforesaid.

Subdivision 4: Is it possible for a party to appeal from an Order, Judgment or Decree wholly in his favor?

A party cannot appeal from a judgment or decree wholly in his favor, and Judge McCormick's interlocutory order was favorable to Bowman. As authority for the foregoing expression, we refer to the case of *Houchin Sales Co. v. Angert,* 11 Fed. (2d) 115, 118, 119, in which case the Court said:

> "That a party may appeal from a judgment in his favor when there has been some error prejudicial to him, or he has not received all he is entitled to * * * there may be grave irregularities or errors which have prevented appellant from receiving the full relief to which he was entitled. While these and other exceptions exist, *the general rule is that a party cannot appeal from a judgment or decree wholly in his favor.*" (The italics are ours.)

The Facts Herein Were, Apparently, Misinterpreted by the Circuit Court.

It seems, from a careful inspection of the final decision of March 14, 1940, that there has been a misinterpretation by the Circuit Court of facts surrounding the applications for rehearing and of the matters adjudicated by the decisions rendered thereon.

The Petition for Rehearing filed September 10, 1936, was filed with the clerk of the District Court at Los Angeles, California (not with the Referee in San Diego, California), and it directly attacks the validity of the Adjudication and Order of Reference entered August 21, 1936. (This proceeding was entirely foreign to and in addition to the Review sought from the ruling of the Referee which was filed August 19, 1938.)

Although the hearing had October 15, 1937, upon which the order of October 25, 1937, was based, was primarily a Review of the Referee's Order denying confirmation of debtor's extension proposals, it may not and cannot be presumed that Bowman abandoned his contention that the Adjudication and Order of Reference was void *ab initio* for he distinctly refers to said Adjudications and Order of Reference in his Petition for Rehearing dated November 15, 1937, by the following wording: "that the adjudication of bankruptcy should be set aside" [Tr. p. 96] and "that this petitioning debtor may have and recover any and all rights which he has lost by reason of the aforesaid orders of the Referee and the said District Judge. [Tr. p. 96.]

THREE.

Was the Adjudication and Order of Reference Void Ab Initio?

Bowman has always contended that the Adjudication and Order of Reference of August 21, 1936, was void *ab initio*, not merely voidable. This contention is based on the fundamental principle that the courts in bankruptcy are of statutory origin and possess only such jurisdiction as is expressly conferred upon them by the National Bankruptcy Act.

Before a District Judge could have been empowered to make the Adjudication and Order of Reference above referred to, he must have first been clothed with the necessary jurisdiction. Before this jurisdiction was granted to him the referee hearing the matter in the bankruptcy court must have complied with the provisions of the statute under which he (the referee) was then and there empowered and authorized to act, and without which he could not act.

This proceeding was under the provisions of Section 74 of the National Bankruptcy Act as amended June 7, 1934 (11 U. S. C. A, 202). Subdivision "L" of said last mentioned section is as follows:

> "if, (1) the debtor shall fail to comply * * *; or, (2) * * *; *or (3) the debtor's proposal has not been accepted by the creditor; or (4) confirmation has been denied;* or (5) without sufficient reason the debtor defaults in any payment required to be made under the terms of an extension proposal, the court * * *. *The Court shall in addition adjudge the debtor a bankrupt if satisfied that he commenced or prolonged the proceeding for the purpose of delaying creditors and avoiding an adjudication in*

bankruptcy or if the confirmation of his proposal has been denied. * * *" (The italicized portions are ours and are the only portions material in this appeal.)

Furthermore, the acts of the Referee are not valid unless he complied with the Amendments and Additions to the General Orders in Bankruptcy, Order of April 17, 1933, paragraph 12, as follows:

"Duties of Referee.

1. * * *

2. * * *

3. * * * Unless otherwise ordered by the judge, applications for the confirmation of a debtor's proposal under Section 74 of the Act, and all objections thereto, *shall be heard and decided by the referee.*" (Italics ours.)

As the Referee did not comply with the terms and provisions of the two last named statutes, any act performed by the Referee was contrary to and in excess of the powers and jurisdiction granted to him by said aforementioned statutes. The statement of the Referee on Bowman's petition for review filed September 24, 1936 [Tr. p. 26] states *"said petition for review with supplementary proposal for extension, which is made a part thereof, is herewith returned to your Honorable Court without the statement and certificate on review for the reason that the undersigned, as referee in bankruptcy, has made no order, the review of which is sought in this proceeding by the debtor."* (The italics are ours.)

Again referring to the General Orders in Bankruptcy under the classification of "Duties of the Referee" we find this language, "unless otherwise ordered by the judge, applications for the confirmation of a debtor's proposal under Section 74 of the Act, and all objections thereto shall be heard and decided by the referee."

There can be no question but that the Referee failed to comply with these statutes. He assumed the functions of a "special master" without any order or authority of any kind giving him such power. Therefore, his recommendation was absolutely void *ab initio*.

It was on such erroneously assumed authority and void recommendation that the Adjudication and Order of Reference was made on August 21, 1936.

Judge McCormick orally confirmed Bowman's contention that the adjudication was erroneous, when he so stated from the bench and when he thereafter made his order re-referring the entire matter back to the Referee with appropriate instructions [Tr. pp. 37-38] and when he then and there stayed all proceedings under the Adjudication and Order of Reference.

There was no evidence before the Court that the debtor "commenced or prolonged this proceeding * * * for the purpose of avoiding an adjudication in bankruptcy" [Engrossed Statement of Evidence, Tr. p. 141], and it was equally clear that the Referee "was satisfied that said proceedings were *not* commenced or prolonged for the purpose of delaying creditors and avoiding any adjudication in bankruptcy.

The logical—and in fact the only—interpretation of said acts by the Referee conclusively indicates that he was not complying with the statutes conferring jurisdiction upon

him; therefore, and by reason of his failure to comply with said statutes every act of his was void. If the acts of the Referee were void it must follow that the District Judge was not clothed with the necessary jurisdiction to have made and entered the Adjudication and Order of Reference. By the same token, if the recommendation of the Referee was void it must follow that any orders subsequently based on such void acts of the Referee must likewise be void. The Court could not breathe life into such a "dead" recommendation.

Courts of bankruptcy are of statutory origin and possess only such jurisdiction as are expressly or by necessary implication conferred upon them by the National Bankruptcy Act.

Jones v. Kansas City Custom Garment Making Co., 1 Fed. (2d) 649;

Collier on Bankruptcy (13th Ed. Vol. 1, p. 42);

In re Hollins, et al. (C. C. A. 2), 229 Fed. 349.

In *Windsor v. McVeigh*, 93 U. S. 274, it was said:

> "All courts, even the highest, are more or less limited in their jurisdiction. They are limited to particular classes of actions * * * Though the court may possess jurisdiction of a cause of the subject-matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things and cannot then transcend the power conferred by the law * * * The judgments mentioned * * * would not be merely erroneous. They would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases."

To the same effect:

Ex parte Lange, 18 Wall. 163, 176, 21 L. Ed. 872;

Cornett v. Williams, 20 Wall. 226, 250, 22 L. ed. 254.

The Referee has only powers expressly conferred by statute, court order of reference, order in bankrutcy, by law, or general orders.

In re Faerstein (C. C. A. 9), 58 Fed. (2d) 942.

All of the proceedings of the District Court rest upon the theory that the Order of the Referee was valid.

In re Rosser, 101 Fed. 562-570.

In the case of *C. C. Taft Co. v. Century Savings Bank,* (C. C. A. 8), 141 Fed. 369, court said:

"The District Court, as a court of bankruptcy, is undoubtedly a court of limited jurisdiction," citing

The Johnson Company v. Wharton, 152 U. S. 252.

Where the petition for adjudication is bad, the judgment of Adjudication will be reversed.

C. C. Taft Company v. Century Savings Bank, supra.

Referee has no jurisdiction, except that conferred by the Bankruptcy Act.

In re Continental Producing Co., 261 Fed. 627;

Blum v. Houser (C. C. A. 7), 202 Fed. 883.

In re Stearns & White Co., 295 Fed. 833, on page 834, the court declared the rule to be:

> "The jurisdiction of the bankruptcy court under each Bankruptcy Act has been derived wholly from the provisions of the act, and the court has no equitable jurisdiction independent thereof. *Ex parte Christy*, 44 U. S. 292, 311; *Morgan v. Thornhill*, 78 U. S. 65, 78."

Your petitioner respectfully, although vigorously, insists that the foregoing brief is conclusive of the facts that:

FIRST: The order made by Judge McCormick, on October 16, 1936, was not a final order; *it was merely an interlocutory order* and it therefore could not be appealed from by petitioner; in any event, the order was not and could not have been sufficiently final to be appealed from and, in addition, appellate tribunals will not consider appeals "piecemeal"; further, the said order being favorable to petitioner, would have made an appeal unavailing, as one cannot appeal from an order favorable to him.

SECOND: The second rehearing in the District Court which was "seasonally presented" and "entertained" by the said District Court did toll the running of the time for an appeal and therefore the appeal herein was filed in time, *i. e.*, within the statutory period and it thereby vested the Circuit Court with jurisdiction to hear and determine "the merits" of the appeal.

THIRD: It seems apparent that the Circuit Court must have misinterpreted the facts herein, probably by failing to distinguish between the first petition for rehearing filed in and granted by the District Court and a petition for review—from an entirely different ruling by the referee—which was filed about the same time; this must have re-

sulted in the Circuit Court confusing the issues to be determined on "the merits."

FOURTH: It seems fundamental that neither the referee nor the bankruptcy court could or can make any order or orders in excess of the authority and jurisdiction specifically granted to them by the statutes comprising the National Bankruptcy Act. In the case at bar, both the referee and the Court assumed authority and assumed jurisdiction in excess of that granted to them by the said National Bankruptcy Act. It, therefore, follows inevitably that the Adjudication and Order of Reference was made in excess of the jurisdiction and authority of the bankruptcy court and the same was and is void *ab initio*—this is particularly true because the Adjudication and Order of Reference was predicated upon the recommendation of the referee which said recommendation was void from its inception.

It is respectfully maintained that this cause is one calling for the exercise by this Honorable Court of its supervisory powers by granting a Writ of Certiorari and thereafter reviewing and reversing the said decisions of the Circuit Court.

Respectfully submitted,

L. A. LUCE,
Counsel for Petitioner.

J. EARL HASKINS,
As of Counsel.

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